U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: APRIL 18, 1989
CASE NO. 88-INA-410 (formerly 86-INA-534)

IN THE MATTER OF

ODESSA EXECUTIVE INN, INC.
Employer

on behalf of

MAHESHCHANDRA J. PATEL
Alien

Appearance: David Swaim, Esquire
Samuel M. Tidwell, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, Guill, Tureck, and Williams
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

The Employer, Odessa Executive Inn, Inc., filed the application for labor certification on behalf of the Alien, Maheshchandra J. Patel, for the position of motel general manager, on January 30, 1985 (AF-118). The job duties entailed all facets of motel management. The requirements for the position were two years of experience in the job offered or in an occupation directly related to motel management. In addition, the "other special requirements" included: availability for extensive overtime at nights and weekends; strong management capabilities; familiarity with all aspects of hotel/motel operations, such as, front desk, housekeeping, personnel administration, and motel maintenance.

The Certifying Officer (C.O.) issued Notices of Findings on June 12, 1985 (AF-F) and January 22, 1986 (AF-D), respectively. The Employer responded thereto by filing Rebuttals on July 31, 1985 (AF-E) and February 5, 1986 (AF-C).

The C.O., in his April 25, 1986 Final Determination, denied the labor certification on the following grounds:

> DENIAL: 20 C.F.R. 656.50 states "employment" means permanent full time work by an employee for an employer other than oneself. For purpose[s] of this definition an investor is not an employee. Since the alien already has controlling interest in the company there is no way he could be unbiased and allow himself to be replaced by a U.S. worker. To do so would defeat his own chances for a visa. Therefore no bona fide job for a U.S. worker exists and this application is inappropriate for labor certification and is denied.

(AF-B).

The Employer requested review on May 26, 1986 (AF-A). Subsequently, Administrative Law Judge John C. Holmes issued a Decision and Order in which the labor certification was denied (AF 49-52). In pertinent part, Judge Holmes stated:

> The Certifying Officer has made a determination that was valid as the matter was originally presented to him: his denial was properly based on a prima facie case that alien was an investor, i.e. he "owned" 65 of the company which was initially capitalized at $180,000. It was incumbent upon Employer to document reasons why alien should not be considered an investor ineligible by definition for labor certification. This he has failed to do. The application was properly denied.

On December 21, 1987, Judge Holmes granted Employer's Motion for Reconsideration and remanded the case back to the C.O., on the grounds that then emerging decisions by the Board of Alien Labor Certification Appeals could affect the decision (AF 30-38).

In a letter dated December 30, 1987, the C.O. requested specific documentation concerning the Alien's interest in Employer's operations, as provided in Judge Holmes' remand order (AF 28-29). In response thereto, the Employer submitted a brief, with exhibits (AF 8-27).

The C.O., in his May 13, 1988 Final Determination, again denied the application for labor certification (AF 6-7). The Employer requested review on May 16, 1988 (AF 3), and subsequently submitted an appellate brief on or about September 22, 1988.

Discussion

The Employer contends that a bona fide job was available, notwithstanding the fact that the alien owns a (65 percent) controlling interest in it. Furthermore, Employer argues that the documentation which it submitted to the C.O. meets its burden of proof to establish that the Alien does not exercise undue influence or control in the hiring process for the job offered as General Manager. Finally, the Employer presents the "displacement theory;" namely, that the Alien is not depriving any U.S. worker of the position, or adversely affecting similarly employed U.S. workers, since no qualified U.S. workers were available (Appellate Brief, pp.9-10).

First of all, we reject the Employer's "displacement theory" as applied in Alien-ownership cases, particularly where the Alien has a controlling interest. The Employer's initial burden is to clearly establish that a job for U.S. workers exists. In the absence of such a showing, Employer's purported efforts to recruit a U.S. worker are irrelevant.

Section 656.50 defines employment as "permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."

In applying this definition to the present case we find that this case is controlled by our decision in Amger Corp., 87-INA-545 (Oct. 15, 1987). In Amger we held that where, under the totality of the circumstances, the employer's employment decision was not independent of the alien's control, a valid employer-employee relationship does not exist, and a valid test of the domestic labor market was not employed, in good faith, to fill the position with a U.S. worker. See also Keyjoy Trading Co., 87-INA-592 (Dec. 15, 1987) (en banc), Friendly Starts, Inc., 87-INA-517 (Jan. 29, 1988).

The brief on remand confirms that the Alien "contributed 65 of the capital necessary to the incorporation" and that the Alien maintains that level of investment to date (AF 15).

Since the Alien can exercise ownership and control through his ongoing 65 interest in the Employer, the Employer has an extremely heavy burden to show that a bona fide job opportunity exists. We find that the documentation presented is insufficient to meet that burden. This is particularly true in the case at bar, where both Judge Holmes and the C.O. directed the Employer

to present specific documentation regarding the corporate structure of the Employer, and Alien's influence on corporate decisions (AF 28,32). The Employer did not file this evidence. Accordingly, we agree with the C.O. that the labor certification application must be denied.

ORDER

The Final Determination of the Certifying Officer denying labor certification is AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge

LB/MP/gaf